IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
On Brief June 18, 2008

RAYMOND MITCHELL, III v. STATE OF TENNESSEE

Appeal from the Circuit Court for Davidson County
No. 07C-2775 Thomas W. Brothers, Judge

No. M2007-02716-CCA-R3-HC - October 27, 2008

A Davidson County Jury convicted Petitioner, Raymond Mitchell, III, of two counts of rape and one count of attempted rape. Petitioner also pled nolo contendere to a separate count of sexual battery. As a result of these convictions, Petitioner received an effective sentence of fifteen years. The trial court indicated that Petitioner was a Range I standard offender on the judgments. Petitioner's direct appeal to this Court was unsuccessful. *State v. Raymond Mitchell, III*, No. M1996-00008-CCA-R3-CD, 1999 WL 559930 (Tenn. Crim. App., at Nashville, July 30, 1999) He subsequently filed a petition for post-conviction relief which was also unsuccessful. At the conclusion of this Court's opinion on appeal from the denial of post-conviction relief, we ordered that the trial court correct the judgments to reflect that Petitioner is actually a multiple rapist and required to serve 100% of his sentence. *Raymond Mitchell v. State*, No. M2003-02063-CCA-R3-PC, 2004 WL 2098335 (Tenn. Crim. App., at Nashville, Sept. 17, 2004), *perm. app. denied*, (Tenn. Feb. 28, 2005). Petitioner next filed a petition for writ of habeas corpus relief based upon the fact that the trial court incorrectly sentenced him as Range I standard offender and that his sentence had expired due to the fact that he was entitled to thirty percent release eligibility. The habeas corpus court summarily dismissed the petition. On appeal, we affirm the summary dismissal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Raymond Mitchell, III, Pro Se, Nashville, Tennessee.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; and Victor S. Johnson, District Attorney General, for the appellee, State of Tennessee.

OPINION

Petitioner was convicted by a Davidson County jury of two counts of rape and one count of attempted rape stemming from several incidents that occurred in 1992 and 1994. *Raymond Mitchell, III*, 1999 WL 559930, at *1. Petitioner was known as the "Fantasy Man" because he would telephone women and convince them to participate in his sexual fantasies by pretending to be a person known to the victims. *Id.* at *1-4. The trial court sentenced Petitioner, as a Range I standard offender, to ten years for each rape conviction and five years for the attempted rape conviction. The two ten-year sentences were ordered to be served concurrently with each other and consecutively to the five-year sentence. *Id.* at *1. These judgments were entered July 1, 1996. In addition to the counts for which Petitioner was on trial, Petitioner pled guilty to the lesser offense of sexual battery stemming from a previously severed count of rape by fraud. *Id.* The trial court sentenced Petitioner to two years for this count to run concurrently with the above sentences. Therefore, the trial court sentenced Petitioner to an effective fifteen-year sentence. *Id.*

The Department of Correction classified Petitioner as a "multiple rapist" for purposes of serving his sentence. *Mitchell v. Campbell*, 88 S.W.3d 561, 563 (Tenn. Ct. App. 2002). This classification prevents Petitioner from earning credits to shorten his sentence. *Id.* Petitioner unsuccessfully petitioned the Commissioner of Correction for a declaratory order to use credits to reduce his sentence. He subsequently filed a petition for declaratory judgment in the Davidson County Chancery Court. *Id.* On January 17, 2001, the trial court dismissed the petition. *Id.* Petitioner appealed to the Tennessee Court of Appeals which held that Petitioner was correctly classified as a multiple rapist, and that Petitioner is therefore ineligible to earn sentence reduction credits. *Id.* at 566.

On April 4, 2001, Petitioner filed a pro se petition for post-conviction relief. *Raymond Mitchell*, 2004 WL 2098335, at *2. Counsel was appointed and an amended petition was filed. The post-conviction court held evidentiary hearings on the petition on December 17, 2002 and May 2, 2003. *Id.* This Court determined that the issues for review on appeal were that: (1) "the prosecutor failed to disclose the identity of an exculpatory witness"; (2) "trial counsel was ineffective in not obtaining the testimony of this witness at trial"; and (3) "the [Department of Correction] was illegally requiring that the petitioner's sentences be served at 100%, rather than 30% as provided by the judgments." *Id.* This Court affirmed the post-conviction court's order denying the petition. *Id.* at 12. Petitioner also included several other issues in his petition. However, the post-conviction court, and subsequently this Court, determined that no proof had been presented on these issues and they were therefore waived. *Id.* at 11-12. At the conclusion of the opinion, this Court also ordered that the post-conviction court enter corrected judgments on Counts 2 and 3 to reflect that Petitioner is a "multiple rapist." *Id.* at 12.

On September 25, 2007, Petitioner filed a pro se petition for writ of habeas corpus relief. In this petition, he argued that the judgments were void in his case because the trial court did not have the statutory authority to sentence him as a Range I standard offender and that his sentence had

expired "under the terms of the original court judgment ten years as a Range I Standard offender." On November 16, 2007, the habeas corpus court summarily dismissed the petition on the merits by written order. Petitioner now appeals the habeas corpus court's dismissal of his petition.

ANALYSIS

The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court's findings de novo without a presumption of correctness. *Id.* Moreover, it is a petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State,* 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. "A void judgment 'is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant's sentence has expired.' We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal." *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

If, after a review of the habeas petitioner's filings, the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further, a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Summers v. State*, 212 S.W.3d 251, 260 (Tenn. 2007); *Hickman*, 153 S.W.3d at 19-20; *Archer*, 851 S.W.2d at 165. For the benefit of individuals such as Petitioner, our legislature has explicitly laid out the formal requirements for a petition for a writ of habeas corpus at Tennessee Code Annotated section 29-21-107:

> (a) Application for the writ shall be made by petition, signed either by the party for whose benefit it is intended, or some person on the petitioner's behalf, and verified by affidavit.

(b) The petition shall state:

(1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;

(2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;

(3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant's knowledge and belief; and

(4) That it is the first application for the writ, or, if a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

A habeas corpus court "properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements." *Summers*, 212 S.W.3d at 260; *See also Hickman*, 153 S.W.3d at 21. Further, in *Summers*, our supreme court explained:

> In the case of an illegal sentence claim based on facts not apparent from the face of the judgment, an adequate record for summary review must include pertinent documents to support those factual assertions. When such documents from the record of the underlying proceedings are not attached to the habeas corpus petition, a trial court may properly choose to dismiss the petition without the appointment of counsel and without a hearing.

212 S.W.3d at 261.

In the case sub judice, Petitioner did not attach all the judgments that were at issue in his petition. This is evidenced by the following statement in the habeas corpus court's order, "Petitioner's rape sentences did not start until after the completion of the third sentence, which this Court has no information about." As stated above, this fact alone is a sufficient basis upon which a habeas corpus court may summarily dismiss a petition for writ of habeas corpus. However, our supreme court has stated:

> A habeas corpus court may properly choose to dismiss a petition for failing to comply with the statutory procedural requirements; however, dismissal is not required. The habeas corpus court may instead choose to afford the petitioner an opportunity to comply with the procedural requirements, or the habeas corpus court may choose to adjudicate the petition on its merits. *See* Tenn. Code Ann. § 29-21-109 (2000) ("If, from the showing of the petitioner, the plaintiff would not be entitled to any relief, the writ may be refused, the reasons for such refusal being briefly endorsed upon the petition, or appended thereto.")

Hickman, 153 S.W.3d at 21 (footnotes omitted). In this case, the habeas corpus court chose to address the petition on the merits, therefore, we will do the same.

Petitioner first argues that the trial court did not have jurisdiction to sentence him as a Range I standard offender due to Tennessee Code Annotated section 39-13-523(b). Under this provision, a person convicted of the crime of rape two or more times is "required to serve the entire sentence imposed by the court" without being diminished by sentence reduction credits. T.C.A. § 39-13-523(b). We faced a similar issue in *Thomas Braden v. Ricky Bell, Warden*, No. M2004-01381-CCA-R3-HC, 2005 WL 2008200 (Tenn. Crim. App., at Nashville, Aug. 19, 2005). In *Thomas Braden*, the petitioner filed a habeas corpus petition arguing that his sentence was illegal and, therefore, void. The basis of his argument was that the judgment reflected a thirty percent release eligibility as opposed to the one hundred percent release eligibility required because he was convicted for rape. *Thomas Braden*, 2004 WL 2008200, at *1. The petitioner in that case argued that his conviction was facially void because it was in contravention to the statute in place at the time. *Id.* at *3. We held that the petitioner was not entitled to habeas corpus relief, even though his sentence was not proper under the statute. *Id.* We pointed to the fact that the cases to which the petitioner cited where habeas corpus relief was granted, including *McLaney v. Bell*, were also cases where the petitioners had pled guilty. In *Thomas Braden*, as in the case at hand, the petitioner had been convicted by a jury. We went on to state:

> [T]he present petitioner was convicted by a jury and sentenced by the trial court. Therefore, the trial court's failure to properly mark the judgment did not deprive the petitioner of any expectation as to release eligibility, because none ever existed. Moreover, the trial court's error did not change the fact that the petitioner was statutorily required to serve one hundred percent of sentence due to his classification as a multiple rapist. As the habeas court correctly noted, the calculation of the petitioner's sentence was "an operation of law" and left no room for discretion. We find this sharply distinguished from a case in which the petitioner is extended a plea agreement containing an illegal sentencing provision and accepted the negotiated sentence to his detriment.

Id. at *4. We concluded that the petitioner was not entitled to habeas corpus relief because "[w]hile the sentences are, on their face, illegal, we conclude that the illegality is not so egregious as to void the sentences." *Id.* at *5.[1] We based this conclusion on *Coleman v. Morgan*, 159 S.W.3d 887 (Tenn. Crim. App. 2004), in which we stated that "mere clerical errors in terms of a sentence may not give rise to a void judgment." *Coleman*, 159 S.W.3d at 890. Furthermore, we noted in *Thomas Braden*, a trial court can correct an illegal sentence so that it complies with the statute by amending the judgment at any time. 2004 WL 2008200, at *4. Therefore, we conclude that Petitioner in this case is likewise not entitled to habeas corpus relief based upon this argument.

We also point out that Petitioner's argument with regard to his illegal sentence is moot. As stated above, this Court has previously ordered that the judgments be amended to reflect the fact that Petitioner is a multiple rapist and is required to serve 100% of his sentence. *Raymond Mitchell*, 2004 WL 2098335, at *12.

Therefore, this issue is without merit.

Petitioner's second issue is that his sentences have expired because he was sentenced as a Range I standard offender with a thirty percent release eligibility. As stated above, the court of appeals and this Court have both previously determined under the law of this State that Petitioner is required to serve 100% of his sentence. *See Mitchell*, 88 S.W.3d at 566; *Raymond Mitchell*, 2004 WL 2098335, at *11. Under the "law of the case" doctrine, issues which have been previously determined on appeal cannot be reconsidered. *Memphis Publ'g. Co. v. Tennessee Petroleum*, 975 S.W.2d 303, 306 (Tenn. 1998). "This rule promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts. *Ladd* [*v. Honda Motor Co., Ltd.*], 939 S.W.2d [83,] 90 [Tenn. Ct. App. 1996)]." *Memphis Publ'g. Co.*, 975 S.W.2d at 306. This doctrine also applies to issues that were determined necessarily by implication. *Id.* Pursuant to this doctrine, we must conclude that Petitioner is required to serve 100% of his sentence. Therefore, the calculation of his release date would not be based upon a Range I standard offender thirty percent release eligibility as he argues. The judgments for Petitioner's case were entered in 1996. He was given an effective sentence of fifteen years. Therefore, his sentence should not expire, by our calculations, until 2011. Clearly, he is not being detained illegally based upon this argument.

In addition, we point out that the release eligibility provided for in the different sentencing ranges does not mean that a defendant's sentence expires upon serving thirty percent of a sentence. Rather, the release eligibility date is the date upon which a defendant may be considered for parole.

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[1] We note that Judge Tipton wrote a separate opinion dissenting in *Thomas Braden*. In his dissent, Judge Tipton initially states that judgments are illegal and are therefore void. *Thomas Braden*, 2005 WL 2008200, at *6. He went on to state that the remedies for an illegal sentence stemming from a guilty plea as opposed to stemming from a jury conviction are different. If the illegal sentence stems from a guilty plea, "the question remains whether or not the plea was based upon the illegal sentence imposed[,]" and a hearing may be held to determine such. *Id.* If the illegal sentence stems from a jury conviction, the trial court should enter a corrected judgment. *Id.*

See T.C.A. § 40-35-501(a)(1). Parole does not constitute the termination or expiration of a sentence, but merely is a form of conditional release. *Baker v. State*, 951 S.W.2d 1, 2 (Tenn. Crim. App. 1977); *Doyle v. Hampton*, 340 S.W.2d 891, 893 (Tenn. 1960).

Therefore, this issue is without merit.

On appeal, Petitioner also asserts that his sentence is excessive based upon *Blakely v. Washington*, 542 U.S. 296 (2004). This issue was not presented in his petition filed with the lower court nor did the lower court address this issue. A party may not take one position regarding a ground in the trial court and change its strategy or theory midstream and advocate a different ground or reason in this Court. *See State v. Aucoin*, 756 S.W.2d 705, 715 (Tenn. Crim. App. 1988); *State v. Dobbins*, 754 S.W.2d 637, 641 (Tenn. Crim. App. 1988).

Even if Petitioner had raised this issue in the lower court, he would still be unsuccessful. Courts in Tennessee have held that *Blakely* violations, in and of themselves, are constitutional violations, but do not render a judgment void. *See Timothy R. Bowles v. State*, No. M2006-01685-CCA-R3-HC, 2007 WL 1266594, at *2-3 (Tenn. Crim. App., at Nashville, May 1, 2007); *James R. W. Reynolds v. State*, No. M2004-02254-CCA-R3-HC, 2005 WL 736715, at *2 (Tenn. Crim. App., at Nashville, Mar. 31, 2005), *perm. app. denied*, (Tenn. Oct. 10, 2005); *Alfio Orlando Lewis v. Ricky Bell, Warden*, No. M2004-02735-CCA-R3-HC, 2005 WL 884998, at *2 (Tenn. Crim. App., at Nashville, Apr. 14, 2005); *Earl David Crawford v. Ricky Bell, Warden*, No. M2004-02440-CCA-R3-HC, 2005 WL 354106, at *1 (Tenn. Crim. App., at Nashville, Feb. 15, 2005), *perm. app. denied*, (Tenn. June 27, 2005). Because a *Blakely* violation renders a judgment merely voidable as opposed to void, it is not subject to attack through a writ for habeas corpus relief. *See Passarella*, 891 S.W.2d at 627.

In addition, courts in Tennessee have also held that *Blakely* does not apply retroactively to cases that have already been finalized on direct appeal and are on collateral appeal. *See Timothy R. Bowles*, 2007 WL 1266594, at *3; *James R. W. Reynolds*, 2005 WL 736715, at *2; *Carl Johnson v. State*, No. W2003-02760-CCA-R3-PC, 2005 WL 181699, at *4 (Tenn. Crim. App., at Jackson, Jan. 25, 2005), *perm. app. denied*, (Tenn. June 27, 2005); *Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at *9-10 (Tenn. Crim. App., at Jackson, Dec. 21, 2004), *perm. app. denied*, (Tenn. May 23, 2005).

Therefore, Petitioner cannot be successful on this issue.

CONCLUSION

For the foregoing reasons, we affirm the habeas corpus court's summary dismissal of Petitioner's petition for writ of habeas corpus.

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JERRY L. SMITH, JUDGE